

ERISA AND DEPARTMENT OF LABOR REGULATIONS

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Section 3 - Definitions

(14) The term "party-in-interest" means, as to an employee benefit plan -

- (A) any fiduciary (including, but not limited to, any administrator, officer, trustee, or custodian) counsel, or employee of such employee benefit plan;
- (B) a person providing services to such plan;
- (C) an employer any of whose employees are covered by such plan;
- (D) an employee organization any of whose members are covered by such plan;
- (E) an owner, direct or indirect, of 50% or more of -
 - (i) the combined voting power of all classes of stock entitled to vote or the total value of shares of all classes of stock of a corporation,
 - (ii) the capital interest or the profits interest of a partnership, or
 - (iii) the beneficial interest of a trust or unincorporated enterprise, which is an employer or an employee organization described in subparagraph (C) or (D);
- (F) a relative (as defined in paragraph 15) of any individual described in subparagraph (A), (B), (C), or (E);
- (G) a corporation, partnership, or trust or estate of which (or in which) 50% or more of -
 - (i) the combined voting power of all classes of stock entitled to vote or the total value of shares of all classes of stock of such corporation,
 - (ii) the capital interest or the profits interest of such partnership, or
 - (iii) the beneficial interest of such trust or estate, is owned directly or indirectly, or held by persons described in subparagraph (A), (B), (C), (D), or (E);
- (H) an employee, officer, director (or individual having powers or responsibilities similar to those of officers or directors), or a 10% or more shareholder directly or indirectly, or a person described in subparagraphs (B), (C), (D), (E), or (G), or of the employee benefit plan; or
- (I) a 10% or more (directly or indirectly in capital or profits) partner or joint venture of a person described in subparagraph (B), (C), (D), (E), or (G).

(15) The term "relative" means a spouse, ancestor, lineal descendant, or spouse of a lineal descendant.

(21)(A) a person is a "fiduciary" with respect to a plan to the extent -

- (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets,
- (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or

(iii) he has any discretionary authority or discretionary responsibility in the administration of such plan.

Section 402 - Establishment of Plan

(a) (1) Every employee benefit plan shall be established and maintained pursuant to a written instrument. Such instrument shall provide for one or more named fiduciaries ...

(c) Any employee benefit plan may provide -

(1) that any person or group of persons may serve in more than one fiduciary capacity with respect to the plan (including service both as trustee and administrator);

Section 403 - Establishment of Trust

(a) Except as provided in subsection (b), all assets of an employee benefit plan shall be held in trust by one or more trustees.

(b) (Note: This subsection provides exceptions to the requirement that there be a trustee. The exceptions generally list insurance policies and contracts, plan assets administered by insurance companies, IRA and Keogh accounts, and any other situation specifically exempted by the Secretary of Labor.)

Section 404 - Fiduciary Duties

(Exclusive Benefit)

(a) (1) ... a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and -

(Prudent Man Rule)

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like capacity and with like aims;

(Note: Also refer to Labor Dept. Regulation 2550.404a-1 "Prudence Regulation" which follows.)

(Diversification)

(C) by diversifying the investments of the plan so as to minimize the risks of large losses ...

(ERISA takes Precedence Over Instrument)

(D) in accordance with the documents and instruments governing the plan insofar as the documents and instruments are consistent with the provisions of this title.

Section 405 - Liability for Breach by Co-Fiduciary

- (a) ... a fiduciary with respect to a plan shall be liable for a breach of fiduciary responsibility of another fiduciary with respect to the same plan in the following circumstances:
 - (1) if he participates knowingly in, or knowingly undertakes to conceal, an act or omission of such other fiduciary, knowing such act or omission is a breach;
 - (3) if he has knowledge of a breach by such other fiduciary, unless he makes reasonable efforts under the circumstances to remedy the breach.

Section 406 - Prohibited Transactions

(Conflicts of Interest and Self-Dealing)

- (a) Except as provided in Section 408:
 - (1) A fiduciary with respect to a plan shall not cause the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect -
 - (A) sale or exchange, or leasing, of any property between the plan and a party in interest;
 - (B) lending of money or other extension of credit between the plan and a party in interest;
 - (C) furnishing of goods, service, or facilities between the plan and a party in interest;
 - (D) transfer to, or use by or for the benefit of, a party in interest, of any assets of the plan; or
 - (E) acquisition, on behalf of the plan, of any employer security or employer real property in violation of Section 407(a).
 - (2) No fiduciary who has authority or discretion to control or manage plan assets shall permit the plan to hold any employer security or employer real estate if he knows or should know that holding such security or real property violates Section 407(a).
- (b) A fiduciary with respect to a plan shall not -
 - (1) deal with the assets of the plan in his own interest or for his own account,
 - (2) in his individual or in any other capacity act in any transaction involving the plan on behalf of a party (or represent a party) whose interests are adverse to the interests of the plan or the interests of its participants or beneficiaries, or
 - (3) receive any consideration for his own personal account from any party dealing with such plan in connection with a transaction involving the assets of the plan.

Section 407

10% Limitation With Respect to Acquisition and Holding of Employer Securities and Employer Real Property by Certain Plans

(Investments in Employer Securities, Real Estate, and Fixed Assets)

- (a) (1) A plan may not acquire or hold -
 - (A) any employer security which is not a qualifying employer security, or

(B) any employer real property which is not qualifying employer real property.

- (3) (A) After December 31, 1984, a plan may not hold any qualifying employer securities or qualifying employer real property (or both) to the extent that the aggregate fair market value of such securities and property determined on December 31, 1984, exceeds 10% of the greater of -

(i) the fair market value of the assets of the plan, determined on December 31, 1984, or

(ii) the fair market value of the assets of the plan determined on January 1, 1975.

- (4) (A) After December 31, 1979, a plan may not hold employer securities or employer real property in excess of the amount specified ... under subparagraph (B).

(B) (This section provides that the level of such assets will be reduced to 50% of the greater of (3)(A)(i) and (ii), above.)

- (d) (4) The term "qualifying employer real property" means parcels of employer real property -

(A) if a substantial number of the parcels are dispersed geographically;

(B) if each parcel of real property and the improvements thereon are suitable (or adaptable without excessive cost) for more than one use ...

- (5) The term "qualifying employer security" means an employer security which is stock or a marketable obligation ...

Section 408 - Exemptions From Prohibited Transactions

- (b) The prohibitions provided in Section 406 (Prohibited Transactions) shall not apply to any of the following transactions:

(Loans to Plan Participants and Beneficiaries)

(1) Any loans made by the plan to parties in interest who are participants or beneficiaries of the plan if such loans

(A) are available to all such participants and beneficiaries on a reasonably equivalent basis,

(B) are not made available to highly compensated employees, officers, or shareholders in an amount greater than the amount made available to other employees,

(C) are made in accordance with specific provisions regarding such loans set forth in the plan,

(D) bear a reasonable rate of interest, and

(E) are adequately secured.

(Own-Bank Interest-Bearing Deposits)

- (4) The investment of all or part of a plan's assets in deposits which bear a reasonable rate of interest in a bank or similar financial institution ... if such bank or other institution is a fiduciary of such plan and if -

(Own-Bank Plans)

- (A) the plan covers only employees of such bank ... or

(Outside Companies' Plans)

- (B) such investment is expressly authorized by a provision of the plan or by a fiduciary (other than such bank or institution or affiliate thereof) who is expressly empowered by the plan to so instruct the trustee with respect to such investment.

(Note: Also refer to Department of Labor Regulation 2550.408b.4, "Investment In Own-Bank Interest-Bearing Deposits", which follows.)

(Own-Bank Common Trust Funds)

- (b) (8) Any transaction between a plan and (i) a common or collective trust fund or pooled investment fund maintained by a party in interest which is a bank or trust company ... if -

(A) the transaction is a sale or purchase of an interest in the fund,

(B) the bank, trust company, or insurance company receives not more than reasonable compensation, and

(C) such transaction is expressly permitted by the instrument under which the plan is maintained, or by a fiduciary (other than the bank, trust company, or insurance company or an affiliate thereof) who has authority to manage and control the assets of the plan.

Section 410 - Exculpatory Provisions

- (a) ... any provision in an agreement or instrument which purports to relieve a fiduciary from responsibility or liability for any responsibility, obligation, or duty under this part shall be void as against public policy.

Section 412 - Bonding

- (a) Every fiduciary of an employee benefit plan and every person who handles funds or other property of such a plan ... shall be bonded as provided in this section; except that -
- (2) no bond shall be required of a fiduciary (or of any director, officer, or employee of such fiduciary) if such fiduciary -
- (A) is a corporation organized and doing business under the laws of the United States or of any State;
- (B) is authorized under such laws to exercise trust powers or to conduct an insurance business;
- (C) is subject to supervision or examination by Federal or State authority; and
- (D) has at all times a combined capital and surplus in excess of such minimum amount as may be established ... which amount shall be at least \$1,000,000.

The amount of such bond will be fixed at the beginning of each fiscal year of the plan. Such amount shall be not less than 10% of the amount of funds handled. In no case shall such bond be less than \$1,000 nor more than \$500,000.

DEPARTMENT OF LABOR
Regulations - Part 2550.404a-1 - "Prudence Regulation"

(a) In General.

Section 404(a)(1)(B) of the Employee Retirement Income Security Act of 1974 (the Act) provides, in part, that a fiduciary shall discharge his duties with respect to a plan with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims.

(b) Investment Duties.

- (1) With regard to an investment or investment course of action taken by a fiduciary of an employee benefit plan pursuant to his investment duties, the requirements of Section 404(a)(1)(B) of the Act set forth in subsection (a) of this section are satisfied if the fiduciary (A) has given appropriate consideration to those facts and circumstances that, given the scope of such fiduciary's investment duties, the fiduciary knows or should know are relevant to the particular investment or investment course of action involved, including the role the investment or investment course of action plays in that portion of the plan's investment portfolio with respect to which the fiduciary has investment duties; and (B) has acted accordingly.

- (2) For purposes of paragraph (1) of this subsection, "appropriate consideration" shall include, but is not necessarily limited to,

(A) a determination by the fiduciary that the particular investment or investment course of action is reasonably designed, as part of the portfolio (or, where applicable, that portion of the plan portfolio with respect to which the fiduciary has investment duties), to further the purposes of the plan, taking into consideration the risk of loss and the opportunity for gain (or other return) associated with the investment or investment course of action, and

(B) consideration of the following factors as they relate to such portion of the portfolio:

(i) the composition of the portfolio with regard to diversification;

(ii) the liquidity and current rates of return of the portfolio relative to the anticipated cash flow requirements of the plan, and

(iii) the projected return of the portfolio relative to the funding objectives of the plan.

- (3) An investment manager appointed, pursuant to the provisions of Section 402(c)(3) of the Act, to manage all or part of the assets of a plan, may, for purposes of compliance with the provisions of paragraphs (1) and (2) of this subsection, rely on, and act upon the basis of, information pertaining to the plan provided by or at the direction of the appointing fiduciary, if-

(A) such information is provided for the stated purpose of assisting the manager in the performance of his investment duties, and

(B) the manager does not know and has no reason to know that the information is incorrect.

(c) Definitions.

For purposes of this section:

- (1) The term "investment duties" means any duties imposed upon, or assumed or undertaken by, a person in connection with the investment of plan assets which make or will make such person a fiduciary of an employee benefit plan or which are performed by such person as a fiduciary of an employee benefit plan as defined in Section 3(21)(A)(i) or (ii) of the Act.**
- (2) The term "investment course of action" means any series or program of investments or actions related to a fiduciary's performance of his investment duties.**
- (3) The term "plan" means an employee benefit plan to which Title I of the Act applies.**

Regulation published in Federal Register, vol. 44, No. 19, pages 5440-54456 on January 26, 1979. Codified to 29 CFR 2550.404a-1.

Note: Also refer to ERISA Section 404(a)(1)(B) "Prudent Man Rule" set forth earlier in this Section.

DEPARTMENT OF LABOR
Regulations - Part 2550.408b-4
"Investment in Own-Bank Interest-Bearing Deposits"

(a) In General.

Section 408(b)(4) of the Employee Retirement Income Security Act of 1974 (the Act) exempts from the prohibition of Section 406 of the Act the investment of all or a part of a plan's assets in deposits bearing a reasonable rate of interest in a bank or similar financial institution supervised by the United States or a State, even though such bank or similar financial institution is a fiduciary or other party in interest with respect to the plan, if the conditions of either Part 2550.408b-4(b)(1) or Part 2550.408b-4(b)(2) are met.

Section 408(b)(4) provides an exemption from Section 406(b)(1) of the Act (relating to fiduciaries dealing with the assets of plans in their own interest or for their own account) and 406(b)(2) of the Act (relating to fiduciaries in their individual or in any other capacity acting in any transaction involving the plan on behalf of a party -- or representing a party -- whose interests are adverse to the interests of the plan or the interests of its participants or beneficiaries), as well as Section 406(a)(1), because Section 408(b)(4) contemplates a bank or similar financial institution causing a plan for which it acts as a fiduciary to invest plan assets in its own deposits if the requirements of Section 408(b)(4) are met.

However, it does not provide an exemption from Section 406(b)(3) of the Act (relating to fiduciaries receiving consideration for their own personal account from any party dealing with a plan in connection with a transaction involving the assets of the plan). The receipt of such consideration is a separate transaction not described in the statutory exemption. Section 408(b)(4) does not contain an exemption from other provisions of the Act, such as Section 404, or other provisions of law which may impose requirements or restrictions relating to the transactions which are exempt under Section 408(b)(4) of the Act. See, for example, Section 401 of the Internal Revenue Code of 1954 (Code). The provisions of Section 408(b)(4) of the Act are further limited by Section 408(d) of the Act (relating to transactions with owner-employees and related persons).

(b) (1) Plan Covering Own Employees.

Such investment may be made if the plan is one which covers only the employees of the bank or similar financial institution or any of its affiliates, or the employees of both.

(2) Other Plans

Such investment may be made if-

The investment is expressly authorized by a provision of the plan or trust instrument, or

The investment is expressly authorized (or made) by a fiduciary of the plan (other than the bank or similar financial institution or any of its affiliates) who has authority to make such investments, or to instruct the trustee or other fiduciary with respect to investments, and who has no interest in the transaction which may affect the exercise of such authorizing fiduciary's best judgment as a fiduciary so as to cause such authorization to constitute an act described in Section 406(b) of the Act.

Any authorization to make investments contained in a plan or trust instrument will satisfy the requirement of express authorization for investments made prior to November 1, 1977.

Effective November 1, 1977, in the case of a bank or similar financial institution that invests plan assets

in deposits in itself or its affiliates under an authorization contained in a plan or trust instrument, such authorization -

Must name such bank or similar financial institution, and

Must state that such bank or similar financial institution may make investments in deposits which bear a reasonable rate of interest in itself (or in an affiliate).

(3) Example.

B, a bank, is the trustee of plan P's assets. The trust instruments give the trustees the right to invest plan assets in its discretion. B invests in the certificates of deposit of bank which is a fiduciary of the plan by virtue of performing certain custodial and administrative services. The authorization is sufficient for the plan to make such an investment under Section 408(b)(4). Further, such authorization would suffice to allow B to make investments in deposits in itself prior to November 1, 1977. However subsequent to October 31, 1977, B may not invest in deposits in itself, unless the plan or trust instrument authorizes it to invest in deposits of B.

(c) Definitions.

- (1) The term "bank or similar financial institution" includes a bank (as defined in Section 7701(a)(19) of the Code) ...
- (2) A person is an "affiliate" of a bank or similar financial institution if such person and such bank or similar financial institution would be treated as members of the same controlled group of corporations or as members of two or more trades or businesses under common control within the meaning of Section 414(b) or (c) of the Code and regulations thereunder.
- (3) The term "deposits" includes any account, temporary or otherwise, upon which a reasonable rate of interest is paid, including a certificate of deposit issued by a bank or similar financial institution.

Regulation published in the Federal Register, Vol. 42, No. 122, page 32392, on June 24, 1977. Codified to 29 CFR 2550.408b-4.

Note: Also refer to ERISA Section 408(b)(4), "Investment in Own-Bank Interest-Bearing Deposits", set forth earlier in this Section.